Filed 8/30/19 P. v. Hinkle CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KRYSTAL HINKLE, Defendant and Appellant.	A152907 (Solano County Super. Ct. No. FCR327566)

Krystal Hinkle, who was convicted by a jury of second degree robbery and sentenced to a five-year prison term, makes three claims on appeal. First, Hinkle contends the trial court erred by denying her probation and a referral to a treatment program for veterans pursuant to Penal Code section 1170.9.[1] Second, Hinkle argues a remand is required in any event so that the trial court can exercise its discretion to refer her to a pretrial diversion program for mental health treatment pursuant to section 1001.36, a new statute that went into effect while this case was on appeal. Finally, Hinkle argues she was denied due process because the trial court imposed fees and fines during sentencing without holding a hearing to determine if she can pay them. We reject each of these contentions and, therefore, affirm the judgment and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2017, at around 11:40 p.m., Hinkle walked into a Nation's Giant Hamburger's Restaurant in Fairfield, wearing a mask and sunglasses, a black hoodie and

[1] Statutory references are to the Penal Code, unless otherwise indicated.

gloves, dark pants, and plaid shoes. Derrick C. was working behind the counter and his coworker Ana D. was mopping the floor. As Hinkle approached the counter, she told the employees to put their hands up and then said: " 'Give me all your money. I'm not playing around. This isn't a joke.' " Derrick hesitated, looking at Ana and thinking to himself that he could not believe what was happening. Then, Hinkle pulled out a gun, pointed it at Ana and then "fixed" it on Derrick. Derrick started placing bills on the counter but Hinkle said she wanted more money, so he took the drawer from the register and placed it on the counter for Hinkle to see. Hinkle told him to "grab" all the money, so he took the cash from the drawer and made a pile on the counter. The gun looked like a semi-automatic pistol. From the moment Derrick saw it he was afraid for his life. Hinkle took the cash, which totaled $288.15, said she was sorry and then left the restaurant.

Within minutes, a Fairfield police officer responded to a 9-1-1 call from the restaurant. Hinkle was apprehended a few blocks away from the Nation's, still wearing the garb she had on when she committed the robbery. Her "mask" turned out to be a black tank top with two holes cut into it. She was carrying a replica firearm and $370 in cash. While Hinkle was in the back seat of the patrol car, the officer informed her of her rights to remain silent and to have counsel present. Hinkle responded that she knew her *Miranda* rights. Initially, Hinkle denied that she had been in Nation's but subsequently admitted committing the robbery. She told the police that she did not mean to scare the employees but she pulled out the gun because the first time she asked them for cash they hesitated and looked at each other. She said she committed the robbery because she was "starving and freezing" and wanted money for food and a hotel room.

In August 2017, Hinkle was tried on a felony charge of second degree robbery. (§ 211.) A video recording of the January 29 incident from the restaurant's surveillance camera was played for the jury. Derrick testified that the robbery significantly impacted his life, causing lasting anxiety and paranoia, and that he had to transfer to another store because he was not able to return to the Fairfield location. Ana also testified that throughout the robbery she was afraid for her life and for her coworker.

Hinkle testified in her own defense. She told the jury that she had not had stable housing since May 2016 when she broke-up with her partner of six years and lost her job. She relied on family and friends or lived on the streets, moving frequently between Fairfield, Napa and American Canyon. She spent the week before the January 29 incident living in a park, staying up at night and sleeping during the day, and dumpster diving for food or anything that would help her stay warm. She found a plastic gun in a dumpster and kept it because it made her feel more secure while living on the streets.

Hinkle testified that seeing the video reminded her that for about an hour before she went into Nation's, she sat by the dumpsters and cried because she was so depressed. She felt lost and helpless and in a daze. She remembered pulling her tank top or sweater over her face to dry her tears, but she could not recall making eye-holes in her shirt or putting on her sunglasses or gloves. She found the glasses in the park and wore them for sun protection and so that people would not see how sad she was. She could not remember walking into the Nation's, but acknowledged that she was the person on the surveillance video. She noticed from watching the video that she was "mechanically moving," and she recalled experiencing fear when she encountered the two employees and realized there could be others in the restaurant as well. She could not recall what she was thinking, but remembered feeling like she was "starving" and "freezing," and she had a vague memory of asking the employees "to open the register." Her focus on the register was a "survival instinct" because she needed money for food and a hotel.

Parts of the video were re-played while Hinkle testified, which reminded her that she acted out of "muscle memory," either in response to the employees' hesitation about "being compliant" or because she realized someone could come up behind her. She was "in a rush to get in, get the cash and then get out, somehow, to survive, go find a hotel or something." She did not think about pulling out the gun, but her muscle memory from basic training in the military took over and she went along with it. As she was leaving, she realized what she was doing and apologized.

At the conclusion of the trial, the jury found Hinkle guilty of the charged robbery. Defense counsel waived time for sentencing, and indicated this could be an appropriate

case for probation and referral to a county program for veterans, which is referred to as "Veteran's Treatment Court." The trial court ordered a pre-sentence report and scheduled a sentencing hearing for September 2017. Then it addressed defense counsel's allusion to a veteran's treatment program. The court confirmed that under 1170.9, if Hinkle could establish a "nexus between her military service and this crime," that could be a ground for referring her to veteran's court or a mitigating sentencing factor. Then the court made the following statement: "I'm not referring this to vet court, I'm telling you right now. I can't see under any circumstances where I would send this to vet court; but I'll keep an open mind and I'll look at the probation reports, but I'd think about that at the time sentencing comes along. [¶] What I saw here was [an] incredibly violent crime and I think your client lied [through] her teeth yesterday. [¶] So with that, we'll put it over for sentencing. . . ."

The probation department filed a pre-sentence report, which summarized Hinkle's criminal history and provided information about her background. Hinkle's prior offenses include a misdemeanor conviction for driving under the influence in 2009 (Veh. Code, § 23152), a felony conviction for brandishing a weapon and causing serious bodily injury in 2010 (§ 417/417.6), misdemeanor convictions for driving on a suspended license (Veh. Code, § 14601.2) and giving false information to a peace officer in 2015 (Veh. Code, § 14601.2 & § 31), and a pending charge of inflicting corporal injury on a partner in 2016 (§ 273.5). When the present offense was committed, Hinkle was on probation, her driver's license was suspended and she was subject to a no-contact restraining order. During a post-conviction interview, Hinkle said she had no recollection of committing the current offense and she hoped the court would give her probation so she could participate in Veteran's Treatment Court.

Hinkle reported that she has completed three years of community college but does not have a degree. She was married in 2009 but has not been in contact with her husband for several years. A six-year relationship with a girlfriend ended in 2016, when she was arrested for domestic violence. In 2011, she was in a car accident and suffered a serious brain injury for which she had surgery. Prior to the current offense, Hinkle was homeless

and unemployed. She was estranged from her family but has had a few visits while incarcerated. The probation report also reflects that Hinkle served in the Army from 2007 until 2010, when she was honorably discharged. Defense counsel provided the department with a report from a doctor who evaluated Hinkle prior to trial and concluded she suffers from anxiety and depression that may be related to her military service.

Hinkle told the probation officer that she began drinking alcohol at age 16. After she was discharged from the military, her alcohol consumption increased and she sometimes experienced blackouts, but she stopped drinking in the summer of 2016. She started smoking marijuana at age 15 but ceased her use while she was in the military. She admitted that she tested positive for marijuana when she was still in the military, but she believed that she mistakenly consumed an edible. After leaving the military, Hinkle smoked marijuana once or twice a month, but she reported that she had not used this substance for about two years.

The probation department recommended that the court sentence Hinkle to an aggravated five-year prison term unless she was accepted into Veteran's Treatment Court. Probation did not appear appropriate for many reasons, including the serious nature of the current offense, Hinkle's failure to comply with prior grants of probation, and a pattern of escalating violent behavior. An upper-term sentence would protect the current victims and the community from Hinkle's "dangerous and violent behavior." The department also opined, however, that probation could be considered, but "only if" Hinkle could access Veteran's Treatment Court.

The People filed a sentencing memorandum requesting that the court impose an aggravated term of five years, based on the violent nature of Hinkle's current offense and prior crimes. Regarding the current offense, the People emphasized that Hinkle used a pellet gun to terrorize vulnerable victims and argued that her testimony at trial was not credible. Moreover, Hinkle's criminal record demonstrated "an increasing tendency to commit violent acts." In 2010, she violated misdemeanor "DUI probation" by stabbing a victim during a fight, which resulted in a prison term, and she was on probation again when she committed the current robbery.

The sentencing hearing was continued to October 20, 2017, pursuant to a defense request for more time to gather mitigating evidence. Prior to the hearing, Hinkle filed a sentencing memorandum urging the court to "follow probation's recommendation of a referral to Veteran's Treatment Court." Defense evidence included a psychological evaluation report from Dr. Robert Wagner, letters from Hinkle's family, and a letter of support from David Shernoff, an Outreach Specialist with the U.S. Department of Veteran's Affairs (VA).

Dr. Wagner, who completed his report while Hinkle awaited trial in this case, based his evaluation on a one hour and forty-minute interview of Hinkle and his review of documents selected by defense counsel. Wagner diagnosed Hinkle with anxiety mixed with depression, and offered the opinion that these conditions resulted from demands that Hinkle imposed on herself to live up to family expectations as well as the demanding career she chose in the military to work as an officer for the Military Police (MP). Wagner did not evaluate Hinkle for PTSD, which typically involves an extraordinary triggering event, but he opined that "[t]he case could be made . . . for her demanding military experience as a profoundly difficult time that triggered the beginning or was the tipping point of her slow slide into alcoholism, feeling overwhelmed, loss of self-confidence, poor judgment, failure at relationship[s], loss of work, and eventual homelessness and poverty." Wagner acknowledged that Hinkle described her military career as a purely positive experience and that she did not blame the military for her current problems. However, he disagreed. Wagner believed that Hinkle's anxiety and depression "were exacerbated by her military experience and profoundly affect all aspects of her life, including her poor judgment in the present crime."

Wagner's report includes a summary of Hinkle's personal history that is not consistent with information Hinkle subsequently provided to the probation department. According to Wagner, Hinkle did not drink alcohol or use marijuana before she joined the military. He reported that Hinkle became a heavy drinker and started using marijuana while she was in the military as a way to relax and numb her feelings, but instead these activities worsened her symptoms of depression, which she had developed as a result of

the stress associated with her assignment with the MP. Wagner stated that, although Hinkle's current offense does not appear to relate directly to alcohol abuse, her homelessness and poverty are attributable to her use of alcohol to combat depression.

The letter from VA Outreach Specialist David Shernoff stated that Hinkle is entitled to a wide array of support services based on her years of service and honorable discharge. Shernoff screened and approved Hinkle for a residential placement in a VA program, and he devised a tentative treatment plan that would be consistent with plans used by the Veteran's Treatment Court. Because Hinkle's current offense was serious, Shernoff interviewed Hinkle twice to assess her current risk level and concluded that she would not pose a threat to other participants in the program.

At the October 2017 sentencing hearing, the trial court stated that it reviewed the pre-sentence report and the sentencing memoranda submitted by the parties. Then the court permitted the defense to present testimony from Wagner and Shernoff. Wagner testified that Hinkle is a good candidate for treatment because she voluntarily participated in services at the jail and she has a positive attitude. He explained that his opinion that Hinkle's current problems are profoundly related to her military service was based on his "interpretation" of her circumstances. According to Wagner, Hinkle is an optimistic person who was excited by the challenge of serving as an Army MP, but she underestimated the difficulties she would face, such as the sexism in that environment. When things "fell apart" for her, Hinkle began using alcohol and marijuana and that was the start of "a long slide into where she is today."

Under questioning from the trial judge, Wagner testified that Hinkle did her military service in Hawaii, where she often had to handle domestic violence matters that arose on the base. The job was stressful because she viewed it as a competition "to do the best job she possibly could" and she set very high standards for herself. The court wanted to know how the stresses of Hinkle's MP job were different than jobs outside the military. Wagner responded that military service was stressful for Hinkle because this "was the job she was in, with her issues." Under cross-examination, Wagner acknowledged that good candidates for Veteran's Treatment Court take personal

responsibility for their actions and show remorse. He testified that he would question the sincerity of a person who lied under oath, which could affect his evaluation of that person. Here, however, defense counsel expressly told Wagner that Hinkle did not lie during her trial testimony.

Shernoff testified consistent with his letter that he approved Hinkle for residential treatment at the VA, that he rejects more applicants than he approves, and that he would not have approved Hinkle if he had any concern that she posed a risk of violence. According to Shernoff, the risk factors that existed when Hinkle was arrested were no longer present because she was now sober and stable on psychotropic medication. If Hinkle was referred to Veteran's Treatment Court, his program could build on the progress she made in jail with a treatment plan affording her services she was entitled to when she left the military but did not ever receive. Shernoff testified that there are individuals participating in Veteran's Treatment Court with "more serious charges" than those made against Hinkle, but under questioning by the court he admitted that he was not aware of any participant in that program who was charged with robbery or a violent assault.

Shernoff testified that he believes Hinkle's untreated mental health issues and substance abuse are "directly related to why she got into the trouble that she did in the community." The trial judge asked Shernoff what about Hinkle's military service caused or contributed to her substance abuse or mental health problem. Shernoff responded that working for the MP is an assignment many people try to avoid because enforcing rules against supervisors and superiors can be a career-ender. Shernoff was also "convinced" that Hinkle faced a "fair amount" of discrimination while she was in the service because she is a female and because of her sexual orientation. Shernoff acknowledged these are the same stresses that a civilian police officer would face, but "it was the job that she was assigned to in the service." Under cross-examination, Shernoff also acknowledged that he and Hinkle never discussed her current offense. He was not concerned about those details because he is not an attorney and his screening process focuses on underlying

mental health and substance abuse disorders to evaluate whether the applicant poses a potential risk to other participants in the VA program.

After both sides presented argument and submitted the matter, the court announced Hinkle's sentence, dividing its ruling into three main parts. First, the court considered whether Hinkle has substance abuse or mental health problems as a result of her military service. It found that Hinkle may have these problems, but they are not the result of her service. The court cited Hinkle's own statements that her military experience was positive. It also pointed out that Hinkle's duties as an MP officer on a base in Hawaii did not seem to be any more stressful than the job of any police officer. The court also noted that the doctor who interviewed Hinkle did not find "that she had PTSD because she was depressed and had anxiety."

Second, the court found that even if Hinkle's conditions are the result of her military service, that would not be a sufficient mitigating factor to warrant probation because there are too many aggravating factors, including the seriousness of the crime, the vulnerability of the victims, and the severe emotional injury that Hinkle caused. The court clarified that in reaching this conclusion it was considering Hinkle's substance abuse and/or mental health problems as a mitigating factor. Nevertheless, it would deny probation because that factor was outweighed by aggravating factors.

Third, the court found that a five-year upper-term sentence was indicated for a multitude of reasons, including: Hinkle was armed and used a weapon to commit a violent crime; she has a previous conviction for using a weapon for which she went to prison; her prior adult convictions are numerous and increasing in severity; she was on probation when she committed the current offense; she served a prior prison sentence; and her prior performance on probation was unsatisfactory.

DISCUSSION

I. The Trial Court Did Not Err By Denying Hinkle Probation

Hinkle first contends that the trial court violated section 1170.9 by denying her probation and the opportunity to participate in Veteran's Treatment Court.

A. Legal Principles

Section 1170.9, subdivision (a) provides that when a person convicted of a criminal offense alleges that she committed the offense "as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her service."

Section 1170.9, subdivision (b) further provides that if the court finds that a defendant is a person described in subdivision (a), and the defendant is eligible for probation, then "the court shall consider the circumstances described in subdivision (a) as a factor in favor of granting probation." (§ 1170.9, subd. (b)(1).) If the court does place the defendant on probation, it "may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that period which the defendant would have served in state prison or county jail, provided the defendant agrees to participate in the program and the court determines that an appropriate treatment program exists." (§ 1170.9, subd. (b)(2).)

Because of the Legislature's use of the word "shall" in section 1170.9, when a defendant invokes this statute, the trial court has a mandatory obligation to determine whether the defendant is an individual described in subdivision (a) and if so to consider that circumstance as a factor in favor of granting probation. (*People v. Abdullah* (1992) 6 Cal.App.4th 1728, 1735.) However, the legislative intent behind this statute is not to "expand probation eligibility for veterans who commit crimes pursuant to these provisions," but rather to ensure that when a criminal defendant is a veteran, the sentencing court is aware of that fact and "of any treatment programs that exist and are appropriate for the person at the time of sentencing if a sentence of probation is appropriate." (Stats. 2006, ch. 788, § 1(f)–(g); see also *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1093 (*Ferguson*).) Thus, "[a]lternative sentencing under section

1170.9 is not triggered unless the court actually decides to grant probation." (*Ferguson,* at p. 1093.)

"The decision whether to grant or deny probation is reviewed under the abuse of discretion standard. [Citations.] 'An order denying probation will not be reversed in the absence of a clear abuse of discretion. [Citation.] In reviewing the matter on appeal, a trial court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary.' " (*Ferguson, supra,* 194 Cal.App.4th at p. 1091.)

B. Analysis

Hinkle limits her appellate challenge to the trial court's determination that she is not a person described in section 1170.9, subdivision (a). She contends the trial court abused its discretion because its finding that any substance abuse or mental health problem that Hinkle may have had did not result from her military service is not supported by substantial evidence. We disagree. Hinkle herself reported that she began drinking alcohol and smoking marijuana when she was a teenager and that she did not engage in these activities during her military service, which was a positive time in her life. The defense also presented other evidence about Hinkle that could explain her current problems, including a difficult childhood and a traumatic brain injury resulting from a car accident. Under these circumstances, we cannot find that the court abused its discretion by concluding that Hinkle's substance abuse and mental health problems did not result from her military service. That Dr. Wagner held a contrary opinion is not dispositive.

Hinkle's second theory is that the trial judge abused its discretion by allowing a personal disagreement with the policy underlying section 1170.9 to affect his sentencing decision. She reasons that section 1170.9 is designed to benefit veterans regardless of where they served or what their duties were, but in this case the trial court essentially admitted that it did not think she was entitled to special treatment because she served on a base in Hawaii and her duties were not more stressful than those of a civilian police officer. This interpretation of the trial court's ruling is not consistent with our standard of

review. Hinkle ignores that defense witnesses who testified that Hinkle's problems are related to her military service based those opinions on general impressions regarding the stressful nature of serving as an MP officer; neither witness referred to or purported to rely on actual experiences Hinkle allegedly had while serving in the military. Under these circumstances, the court's probing for some concrete distinction between the work of an MP officer and the job performed by a civilian police officer was relevant to assist the court in evaluating the opinions provided by these witnesses.

Hinkle points out that the trial judge stated he would not refer her to Veteran's Treatment Court even before considering the evidence presented at sentencing. Hinkle ignores, however, that the reason the court had that visceral reaction was because it had just heard Hinkle's trial testimony and thought she was a dishonest witness. Moreover, the court immediately recognized that its initial reaction was premature and stated it would keep an open mind and consider the relevant evidence at sentencing. Importantly, the trial court never voiced any criticism about section 1170.9 or made any disparaging comment about programs available to veterans.

Even if Hinkle could show that the trial court relied on an improper consideration in determining that her substance abuse and mental health problems did not result from her military service, that was not the only basis upon which probation was denied. Instead, the court explicitly found that even if Hinkle was a person described in section 1170.9, subdivision (a), that mitigating factor was outweighed by numerous other aggravating factors. On appeal, Hinkle does not dispute any of the aggravating factors cited by the court to support its decision to deny probation. Nor does she dispute the many factors used to support her upper-term sentence. Thus, Hinkle fails to demonstrate that the trial court abused its discretion by denying her probation.

II. Hinkle Is Not Entitled to Consideration for Pretrial Diversion

Hinkle argues that this case must be remanded so the trial court can consider her for pretrial diversion to a mental health treatment program pursuant to section 1001.36, a statute that went into effect after Hinkle was tried, convicted and sentenced. According

to Hinkle, section 1001.36 applies retroactively to all cases that are not yet final and this record shows that she is a good candidate for pretrial diversion.

A. Statutory Overview

Section 1001.36 creates a discretionary pretrial diversion program for criminal defendants who have been diagnosed with a qualifying mental disorder, such as post-traumatic stress disorder, and whose current charges do not include a disqualifying crime, such as murder or a serious sexual offense. (§ 1001.36, subds. (b)(1)–(2).) The purpose of this statute is to "promote all of the following: (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." (§ 1001.35.)

A trial court has discretion to grant pretrial diversion to an otherwise eligible defendant if it finds that all of the following requirements are satisfied: "(1) a qualified mental health expert has recently diagnosed the defendant with a qualifying mental disorder; (2) the mental disorder was a significant factor in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b)(1)(A)–(F).)" (*People v. Cawkwell* (2019) 34 Cal.App.5th 1048, 1053, review granted August 14, 2019, S256113.)

As used in section 1001.36, "pretrial diversion" means "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment," subject to several specified restrictions. (§ 1001.36, subd. (c).) If pretrial diversion is granted, the defendant may be placed in an approved

mental health treatment program for a maximum period of two years. (*Id*., subds. (c)(1), (c)(3).) If the defendant commits a crime or otherwise performs unsatisfactorily in the diversion program, the trial court may reinstate the criminal proceedings. (*Id*., subd. (d).) "If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (*Id.*, subd. (e).)

B. Analysis

Hinkle argues that the pretrial remedy created by section 1001.36 applies to defendants appealing their convictions notwithstanding the general rule that "a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287; see also § 3 ["[n]o part of [the Penal Code] is retroactive, unless expressly so declared"].)

According to Hinkle, the ameliorative benefit afforded by section 1001.36 gives rise to an inference of retroactivity under the "*Estrada* rule." (See *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).) She reasons that this statute is like provisions of The Public Safety and Rehabilitation Act of 2016 (Proposition 57), which established a new, more restrictive procedure for prosecuting juveniles as adults. In *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299 (*Lara*), our Supreme Court applied the *Estrada* rule to find that Proposition 57 applies retroactively because it "reduces the possible punishment for a class of persons," which permits the inference of retrospective operation and "nothing in Proposition 57's text or ballot materials rebuts this inference." (*Lara,* at pp. 303–304.)

Hinkle takes her retroactivity argument from *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted December 27, 2018, S252220 (*Frahs*). In that case, the defendant was charged with two counts of robbery for stealing a beer and an energy drink from a small store. At his jury trial, the defendant presented evidence he suffered from schizophrenia, but he was nevertheless found guilty. Later, the appellate court remanded the case, so the trial court could consider granting defendant a mental health diversion under newly enacted section 1001.36. (*Id*. at pp. 786–787.) Employing the reasoning of

Lara and *Estrada*, the *Frahs* court reasoned that section 1001.36 is an " 'ameliorating benefit,' " and that it should be applied as broadly as possible to further the legislative purpose of increasing diversion of individuals with mental disorders. (*Id.* at p. 791.) Since the defendant's case was not yet final, the court found, section 1001.36 was potentially available to him notwithstanding that his current criminal action had "technically been 'adjudicated' in the trial court." Moreover, because the record showed that the defendant might qualify for diversion, the court ordered a limited remand, so the trial court could exercise its discretion under section 1001.36. (*Ibid.*)

After the California Supreme Court granted review in *Frahs* pursuant to its own motion, intermediate appellate courts reached different conclusions about the soundness of *Frahs'* retroactivity analysis. *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*) rejects *Frahs*, holding that "section 1001.36 does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt and sentencing." (*Id.* at p. 760.) *Craine* reasons that, although section 1001.36 "confer[] a potentially ameliorative benefit to a specified class of persons" (*id.* at p. 754), "the text of section 1001.36 and its legislative history contraindicate a retroactive intent with regard to defendants . . . who have already been found guilty of the crimes for which they were charged." (*Id.* at p. 749.) On the other hand, *People v. Weaver* (2019) 36 Cal.App.5th 1103 holds that the ameliorative benefit of this new statute gives rise to a presumption of retroactive application, which cannot be rebutted because the Legislature did not clearly signal its intent for the statute to apply only prospectively. (*Id.* at pp. 1117–1121.)

In this case, we assume without deciding that section 1001.36 is retroactive. We nevertheless deny Hinkle's request for a remand so the trial court can exercise discretion to decide whether to grant Hinkle pretrial diversion. " 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court.' " (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) Thus, when a court fails to exercise "informed discretion" because it is unaware of the scope of its discretionary powers, a remand for resentencing is appropriate "unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware

that it had such discretion.' " (*Ibid.*; see also *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) Here, the record does clearly indicate that the trial court would not have exercised its discretion to grant Hinkle diversion to a treatment program.

As noted previously, a criminal defendant must satisfy six statutory criteria before she may be considered for pretrial diversion. (§ 1001.36, subd. (b).) Hinkle contends that she is entitled to a remand based on evidence that all six criteria can be satisfied. We doubt, based on its other findings, that the trial court would agree with respect to at least two of the statutory factors.

First, for a defendant to be eligible for pretrial diversion, the court must be "satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense," in that it "substantially contributed" to the commission of that offense. (§ 1001.36, subd. (b)(1)(B).) Here, Hinkle's mental disorders are alcoholism and depression. The record contains no evidence that Hinkle was under the influence of alcohol when she committed the robbery. To the contrary, she told the probation officer that she had stopped drinking many months earlier. Furthermore, the only evidence that could establish a direct causal link between Hinkle's depression and her commission of armed robbery was her own trial testimony, which the court did not believe.

Second, eligibility for pretrial diversion also requires that the court must be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety . . . if treated in the community." (§ 1001.36, subd. (b)(1)(F).) In deciding whether this requirement is met, the court has broad discretion to consider "any factors that [it] deems appropriate." (*Ibid.*) In this case, the record indicates quite clearly that even after considering Mr. Shernoff's testimony, the trial court was not satisfied that it could place Hinkle in a treatment program without creating an unreasonable risk of danger to the community. First, in exercising its discretion under section 1170.9, the court denied Hinkle's request for a referral to Veteran's Treatment Court. Second, in exercising its broader discretion under the sentencing law, the court not only denied Hinkle probation but gave her an upper-term sentence. It made each of these choices because, among other things, it considered Hinkle's current offense and criminal history

indicative of a pattern of escalating violence, which demonstrated to the court that she poses a significant danger to the community.

Under these circumstances, the record indicates that Hinkle may not be eligible for pretrial diversion and, even if she were eligible, the trial court would not have exercised its discretion to grant that relief. Accordingly, a remand is not required on these facts. (See e.g. *People v. Jefferson* (2019) 38 Cal.App.5th 399, 408 & 409 [remand not required when record shows defendant is not eligible for diversion program]; *People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1391 [failure to exercise discretion not a ground for remand when record shows that the trial court would have reached the same conclusion].)

III. Hinkle Fails to Prove a Due Process Violation Occurred

In supplemental briefing, Hinkle contends the trial court erred by requiring her to pay restitution fines and court assessment fees without finding that she has the ability to pay them. As support for this claim, Hinkle relies on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), which was decided after she filed the present appeal.

A. Additional Background

The pre-sentence report recommended that the court require Hinkle to pay the following fines and fees as part of her sentence: (1) a $300 restitution fine (§ 1202.4); (2) a $300 probation revocation restitution fine (§ 1202.44); (3) a $10 fine for committing a theft-related offense (§ 1202.5); (4) a $40 court security fee (§ 1465.8); (5) a $30 conviction assessment (Govt. Code, § 70373).

At the October 2017 sentencing hearing, there was no substantive discussion about the recommended sentencing fines and fees. After denying Hinkle probation and explaining its decision to impose an upper-term sentence, the court announced Hinkle's custody credits and then stated: "She'll pay $1500 pursuant to 1202.4; $1500 pursuant to 1202.45. The latter is stayed pending successful completion of parole." Then the court advised Hinkle of her parole obligation upon release and her right to appeal and reserved jurisdiction to address victim restitution. Defense counsel did not object to these rulings or give any response when the court inquired whether there were any other matters to address.

The court's oral rulings were recorded in a minute order and on the abstract of judgment. In addition, the order and abstract impose the $40 court security fee and $30 conviction assessment that was recommended in the pre-sentence report.

B. Analysis

Hinkle contends that the trial court violated her due process rights by imposing the court fees and restitution fines outlined above. She reasons that this court must presume that she is indigent because the trial court did not conduct an ability-to-pay hearing and that the additional burden of being charged with fees and fines that she cannot pay violates due process under the reasoning of *Dueñas, supra*, 30 Cal.App.5th 1157.

The *Dueñas* defendant was convicted of driving on a suspended license and sentenced to probation. (*Dueñas, supra,* 30 Cal.App.5th at p. 1160.) At her sentencing hearing she objected that she did not have the ability to pay statutory fees and fines, requested a hearing on the matter and produced undisputed evidence establishing her inability to pay. (*Id*. at p. 1162.) Consequently, the court struck some fees, but imposed others that it concluded were mandatory. (*Id*. at pp. 1162–1163.) On appeal, the *Dueñas* court found it was a violation of constitutional due process to impose court assessments required by section 1465.8 and Government Code section 70373, neither of which was intended to be punitive, without finding that the defendant had the ability to pay them. (*Dueñas,* at p. 1168.) The court also found that, although a restitution fine imposed under section 1202.4 was considered additional punishment for defendant's crime, that fine posed constitutional concerns because the statute required imposition of a minimum fine irrespective of the defendant's ability to pay it. To avoid the constitutional problem, the court held that section 1202.4 requires a trial court to impose a minimum fine regardless of ability to pay, but that execution of the fine must be stayed until the defendant's ability to pay is determined. (*Id*. at p. 1172.)

Unlike the *Dueñas* defendant, Hinkle did not request a hearing regarding her ability to pay any fines or object to them on *any* factual or legal ground. Thus, she forfeited her claim that these fines should not have been imposed. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 [appellate forfeiture rule applies to probation fines and

attorney fees imposed at sentencing]; *People v. McCullough* (2013) 56 Cal.4th 589, 596–597 (*McCullough*) [defendant forfeits appellate challenge to the sufficiency of evidence supporting a Gov. Code, § 29550.2, subd. (a) booking fee if objection not made in the trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [appellate forfeiture rule applies to defendant's claim that restitution fine amounted to an unauthorized sentence based on his inability to pay]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [claim that trial court erroneously failed to consider ability to pay a restitution fine forfeited by the failure to object].)

Hinkle argues her challenge is not forfeited for multiple reasons. Regarding the court fees specifically, Hinkle contends that defense counsel did not have the opportunity to object because the court did not mention these fees when it announced Hinkle's sentence. However, as Hinkle herself points out, these assessments are mandated by statute. Moreover, Hinkle had notice of them because they were included in the list of fees and fines recommended in the pre-sentence report. In any event, these two assessments totaled $70 and any error in failing to mention them at the hearing was necessarily harmless because the court did specify the much higher $1,500 restitution fines and Hinkle did not object that she lacked the ability to pay those fines or request an ability-to-pay hearing.

Hinkle contends that objecting to the restitution fines would have been futile because at the time of her sentencing hearing she did not have the benefit of the *Dueñas* decision. (See *People v. Castellano* (2019) 33 Cal.App.5th 485, 488–489; but see *People. v Frandsen* (2019*)* 33 Cal.App.5th 1126, 1154–1155 [positing that *Dueñas* was based on settled principles of due process].) This argument misconstrues the reason for finding a forfeiture in this present case. Forfeiture did not result from Hinkle's failure to make a substantive due process objection to the statutory fines but rather from her failure to request a hearing or to otherwise dispute her ability to pay them. In contrast to *Dueñas*, in this case the court imposed a restitution fine that exceeded the $300 minimum fine required by section 1202.4, and therefore Hinkle's ability to pay was a statutory consideration under subdivision (d) of that statute. If Hinkle believed she was unable to

pay the $1,500 restitution fine, it was incumbent on her to object at sentencing and request an ability-to-pay hearing. (See *People v. Johnson* (2019) 35 Cal.App.5th 134, 138, fn. 5 (*Johnson*) [recognizing that the "distinction between minimum and above minimum restitution fines has consequences for the applicability of forfeiture doctrine"].)

Hinkle contends her claim is cognizable despite her failure to object because when she was sentenced for her current offense the trial court did not realize that it had discretion to not impose these statutory fees and fines. As support for this argument, Hinkle invokes the rule that a trial court's " '[f]ailure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal.' " (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.) This rule is inapposite because Hinkle points to nothing in the record to suggest the trial court was unaware that inability-to-pay is a consideration when setting restitution above the statutory minimum. Hinkle argues alternatively that she was entitled to an ability-to-pay hearing as a matter of law. Contrary to Hinkle's premise, however, *Dueñas* does not mandate an ability-to-pay hearing in every case in which a statutory fee or fine is imposed on a criminal defendant.

Hinkle argues that "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (Quoting *People v. Vera* (1997) 15 Cal.4th 269, 276.) But she ignores binding authority, which establishes that sentencing-related fees and fines do not implicate the narrow category of rights that are excepted from the forfeiture rule. (*People v. Trujillo* (2015) 60 Cal.4th 850, 855–856; see also *People v. Aguilar*, *supra,* 60 Cal.4th 862*; McCullough*, *supra,* 56 Cal.4th 589.) Hinkle also argues that failure to object does not forfeit an appellate challenge to the sufficiency of the evidence of a defendant's ability to pay a sentencing fee. Again though, our Supreme Court has held otherwise. (*McCullough*, *supra,* 56 Cal.4th 589.)

Finally, Hinkle argues that if the forfeiture rule applies, she was denied the effective assistance of counsel. To prove this alternative claim, Hinkle must overcome a presumption that she received effective assistance by demonstrating that her trial

counsel's representation fell below an objective standard of reasonableness resulting in demonstrable prejudice. (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437.) Hinkle argues she can make that showing here with respect to the $1,500 restitution fine imposed under section 1202.4, reasoning as follows: First, it was clear at the time of sentencing that Hinkle was indigent, homeless and unable to engage in gainful employment because of her mental health or substance abuse issues. Second, if defense counsel had used this evidence to make a due process argument based on the reasoning of *Dueñas*, there is a reasonable probability the trial court would have lowered the fine to its statutory minimum or stricken it altogether. This argument is factually weak and legally flawed.

The only evidence regarding Hinkle's financial resources came from Hinkle herself. She told the police officer who arrested her that she robbed the Nation's because she was starving, but she had more cash in her pocket than what was stolen from the restaurant. At trial, Hinkle testified that she committed her crime because she was desperate for food and shelter. However, the trial judge who sentenced her expressly stated that he did not believe Hinkle's testimony. Hinkle also told Dr. Wagner and the probation department that she lacked financial resources when she committed the current offense, but this claim was not verified by an independent source. Moreover, she also reported that she had some college education and employment experience outside the military and that she planned to return to the workforce if given the opportunity to live in the community.

Thus, the appellate record does not establish the factual premise of Hinkle's ineffective assistance claim, which is that there was unequivocal evidence that she lacked the ability to pay her restitution fine. Indeed, on this record, defense counsel could have made the reasonable tactical decision not to request an ability to pay hearing, because efforts to prove that Hinkle was without financial resources could have undermined the defense strategy of attempting to demonstrate that Hinkle was a good candidate for probation despite historical circumstances suggesting otherwise.

In her reply brief, Hinkle contends that her inability to pay restitution was manifested by two undisputed facts: She could not afford to reimburse the government

for the costs of her public defender; and she faced a long prison term, during which time she would have virtually no ability to earn income. Relying on section 987.8, Hinkle argues that these circumstances entitled her to a statutory presumption that she lacked the ability to pay restitution. We disagree.

Section 987.8 gives the trial court discretion to require a convicted defendant to reimburse the government for the costs of court-appointed counsel if specific requirements are met. Among other things, the reimbursement order must be supported by a "determination of the present ability of the defendant to pay" the costs of appointed counsel (*id*., subd. (b)), based on a consideration of the defendant's present financial position and "reasonably discernible future financial position" during the six month period following the ability to pay hearing (*id*., subd. (g)(2)(B)). As to the second of these factors, section 987.8 provides that, absent "unusual circumstances, a defendant sentenced to state prison, . . . shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." (*Ibid*.)

The section 987.8 factors for determining whether a defendant has the ability to reimburse the costs of her defense have no bearing on the very different question whether he or she has the ability to pay a restitution fine under section 1202.4. (*People v. Douglas* (1995) 39 Cal.App.4th 1385, 1396–1397.) When considering a defendant's ability to pay a restitution fine, the court is not limited to consideration of a discrete time period and is not precluded from considering prison wages. (*Ibid*.; *People v. Santos* (Aug. 15, 2019, No. H045518) __ Cal.App.5th ___ [2019 Cal.App.LEXIS 759, pp. 17–18].) The ability to pay a restitution fine does not necessarily require " 'existing employment or cash on hand' " because the court may also consider the " 'defendant's ability to pay in the future,' " including her ability "to obtain prison wages and to earn money after [her] release from custody." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; see also *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376–1378; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1488.) "Thus, a defendant may lack the 'ability to pay' the costs of court-appointed counsel yet have the 'ability to pay' a restitution fine." (*Douglas*, at p. 1397.)

In light of this settled law, the failure to use section 987.8 as a basis for arguing that Hinkle lacked the ability to pay restitution did not constitute ineffective assistance of counsel. *People v. Rodriguez* (2019) 34 Cal.App.5th 641, cited in Hinkle's supplemental reply brief, is inapposite as that appeal was from an order to reimburse attorney costs under section 987.8. No such order was made in this case.

Nor are we persuaded by Hinkle's legal theory that her trial counsel's representation fell below an objective standard of reasonableness because he did not use evidence of her financial straits to make a substantive due process objection to the restitution fine based on the reasoning of *Dueñas*. As a different panel of this court has previously explained, the *Dueñas* defendant presented compelling evidence that she was an indigent probationer whose inability to pay court assessments resulted in ongoing unintended punitive consequences. (*Johnson, supra,* 35 Cal.App.5th at pp. 138–139.) These consequences of nonpayment implicated due process principles because they constituted additional punishment due *solely to the fact* that the defendant was indigent. (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.) However, Hinkle's factual situation was markedly different for reasons just discussed, and she does not articulate any reason why a competent attorney in her trial counsel's position would have considered a due process objection to the restitution fine to have merit.

Even if defense counsel should have made a *Dueñas*-type objection to the restitution fine, Hinkle would also have to demonstrate that the failure to object resulted in actual prejudice. However, absent concrete evidence that Hinkle's inability to pay this fine will have an unforeseen punitive consequence, we cannot find that it is reasonably probable the trial court would have reduced or stricken her restitution fine if an objection had been lodged.

DISPOSITION

The judgment and sentence are affirmed.

_____
TUCHER, J.

WE CONCUR:

_____
POLLAK, P. J.

_____
BROWN, J.